No. 2758

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. E. ELLIS,

Appellant,

vs.

GEO. C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Appellees.

Appellees' Brief

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

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prior to the date of hearing this action. The appellees in order to avoid a continuance or delay are compelled to prepare their brief without being advised as to the contention of the appellant, further than what may be gathered from his assignments of error.)

STATEMENT OF THE CASE.

This is an appeal from the United States District Court for the Territory of Alaska, Third Division. The proceeding which this court is called upon to review was an equitable action brought by the appellees against the appellant. In the court below, appellees were decreed to be the owners and entitled to the immediate possession of an undivided one-fifth interest in and to eight certain lode mining claims, situated on Valdez Bay. The decree further required appellant to convey to the appellees said undivided one-fifth interest according to the respective interests of the appellees, and further enjoined appellant from in any manner contesting the rights of said appellees to their interests in said property, and commanded appellant to let said appellees into immediate possession and enjoyment of their interest therein.

On and prior to May 15th, 1907, the appellant H. E. Ellis was the owner of the Mystic lode mining claim, situated on Valdez Bay. On said 15th day of May, 1907, appellant entered into an agreement with appellees Treat and Smith, whereby said appellees advanced the sum of $500.00 to appellant to enable appellant to mine and ship about five tons of ore to a smelter outside of the Territory of Alaska. Under the terms of said agreement, said appellees Treat and Smith were to receive back said sum of $500.00, together with twelve per cent interest thereon and one-fourth of the net returns from the smelter. This contract was made in the form of a mortgage and provided on its face that it was a mortgage provided appellant failed to carry out said contract. Something over four tons of ore were shipped subsequent to this contract and the returns from the smelter were so unsatisfactory to all parties concerned that no further shipments were made. The matter remained in this condition until July 9, 1908, when a second contract, in writing, was made between said parties, whereby it was agreed that a mining corporation was to be formed by the parties to said agreement. Under the terms of this agreement, appellant was to deed eight gold mining claims, including said Mystic gold mining

claim, to said corporation, in return for which all of the capital stock of said corporation was to be issued to appellant Ellis, as owner, who was to transfer to appellees Smith and Treat twenty per cent of said capital stock, and turn over to the treasury of the corporation twenty per cent, to be sold to pay for development on said claims. In consideration therefore the appellees Treat and Smith agreed to "pay all expenses in incorporating said company, recording and filing the necessary papers thereof, and receipt in full for all claims that said Treat and Smith, or either of them, have against said Ellis," and "to give whatever time and attention that may be necessary to properly organize said corporation and the sale of said stock." Appellee Smith, who is an attorney at law, prepared the articles of incorporation in quadruplicate and certain written agreements, signed by appellant, wherein he agreed to deed to the corporation twenty per cent of the capital stock. Due to financial conditions in Valdez at that time none of the treasury stock of the corporation was sold, and the corporation papers were never filed or recorded for the reason that the parties did not wish to tie the property up in a corporation until some assurance could be had that the treasury stock could be placed. In May, 1909, one A. J.

Crane, of Seattle, Washington, went to Valdez, Alaska, with a stamp mill to be placed on some property that he and others had become interested in. This property proved to be valueless and the appellees Treat and Smith endeavored to induce Mr. Crane to buy the treasury stock in said corporation. Said Crane examined the property and made a proposition to lease it for a term of years. Appellant was willing to join in the making of a lease, but insisted upon greater royalties than said Crane was willing to give. In order to induce appellant to join in the making of a lease, appellees Treat and Smith, who were anxious to have the property developed, agreed to accept fifteen per cent of the royalty during the life of the lease, insisting, however, upon retaining their full twenty per cent interest in said property.

Accordingly, on June 5, 1909, appellant and appellees Treat and Smith, as owners, gave to said Crane an option to lease said mining claims. Under the terms of said option twenty per cent of the net product of said mining claims during the first year and for the remaining five years twenty-five per cent of the net proceeds, was to be paid to the lessors, Ellis, Treat and Smith. Eighty-five per cent of said royalty was to be paid to the appellant and fifteen per cent to the appellees Treat

and Smith. The lessee was to erect suitable reduction works on said mining claims, and all machinery and improvements were to revert to the owners of said mining claims at the expiration of said lease.

On the 23rd of July, 1909, one B. F. Millard, Trustee, who had purchased all of the rights of said Crane under said option, entered into a lease with the appellant and the appellees, Treat and Smith. The caption of said lease was as follows:

"This indenture made this 23rd day of July, A. D. 1909, between H. E. Ellis, four-fifths owner, George C. Treat and Edmund Smith, each owning ten per cent, all of Valdez, Alaska, parties of the first part, and lessors, and B. F. Millard, Trustee, of Valdez, Alaska, party of the second part, and lessee, Witnesseth:"

This lease further provided for the return of the property to the lessors at the expiration of the lease. The said lessee Millard formed a company called the Cliff Gold Mining Company and proceeded to develop the property. This venture met with success.

While the mining operations were being carried on there were numerous objections and exceptions by the owners of the property signed by the appellant Ellis and the appellees Treat and Smith, objecting to the method of mining, and throughout

the period of such operation all expenses which were found to be proper charges against the owners of the property were distributed on a basis of eighty per cent to appellant Ellis and twenty per cent to the appellees.

On or about the 3rd day of January, 1913, the appellee Logan Archibald, purchased from appellee Edmund Smith, an undivided one-half of said Smith's interest in and to each and all of said mining claims. Upon the trial of the case below the court found for appellees. From the entry of the decree in favor of the appellees this appeal has been prosecuted.

ARGUMENT AND AUTHORITIES.

Appellant's first assignment of error is directed to the ruling of the trial court upon appellant's demurrer to the appellees' complaint. The first ground of the demurrer, namely, that several causes of action have been improperly united, is clearly bad, as will appear by a very casual examination of the complaint.

The second ground of demurrer, namely, that the complaint does not state facts sufficient, is also bad, as will appear from reading the com-

plaint. The complaint clearly states a cause of action. However, after the appellant's demurrer was overruled, the appellant proceeded to trial and made no objection and took no exception to the introduction of evidence under the complaint, so that any error that might have been committed by the court in sustaining the demurrer (as to the second ground of the demurrer), was clearly waived by not objecting to the introduction of any evidence at the commencement of the trial, and the evidence having been admitted, under the Alaska Code of Civil Procedure, the complaint must be treated as amended to conform to the proofs. Compiled Laws of the Territory of Alaska, Sections 919 to 924, inclusive.

Appellant's second assignment of error is directed to the ruling of the court in denying appellant's motion to strike from the appellees' complaint. The ruling of the court in this respect was clearly right. First, because the motion to strike is not directed to any particular allegation contained in the complaint, but refers merely to *paragraphs* or parts of *paragraphs*. It is elementary that there is no such a thing known to our system of pleading, either at common law or by code, as a *paragraph*. Merely as a matter of convenience custom has grown up to separate the va-

rious allegations contained in a pleading into paragraphs, but the paragraph is no part of a pleading and a motion can only be directed to some specific allegation or allegations contained in the pleading, and the paragraph is referred to merely as a matter of convenience in locating the particular allegation referred to.

Furthermore, the only ground contained in the motion to strike, is *"That the same is immaterial, irrelevant, redundant and surplusage,"* so it is apparent that the ruling of the court could not be prejudicial even though it might have been technically erroneous and especially is this true in a case that is tried to the court, for it is presumed that the court being learned in the rules of pleading and evidence, will disregard any *immaterial, irrelevant,* or *redundant* matters.

Appellant's assignments of error Nos. 3, 4, 5, 6 and 7 are all predicated upon the ruling of the court in permitting the appellees to amend their complaint at the close of their evidence, by striking therefrom certain allegations. It is not claimed by the appellant that he has been misled to his prejudice by the amendment sought and it was clearly not an abuse of discretion by the trial court in granting the motion.

Amendments may be allowed in the discretion of the trial court at any time. *Ebner Gold Mining Co. vs. Alaska Juneau Gold Mining Co.,* 210 Fed. 599. *Compiled Laws of the Territory of Alaska,* Section 919 (*Carter's Alaska Code,* Part 4, Section 87):

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just."

Compiled Laws of Alaska, Section 920 (*Carter's Alaska Code,* Part 4, Section 88):

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."

Compiled Laws of Alaska, Section 924 (*Carter's Alaska Code,* Part 4, Sec. 89):

"The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons it may, at any time before the cause is submitted, allow such plead-

ing or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming to the pleading or proceeding to the facts proved."

Appellant's eighth assignment of error is predicated upon the ruling of the court denying his motion for non-suit at the close of appellees' case. The record discloses that after his motion for non-suit was denied, appellant proceeded to introduce evidence on his own behalf instead of resting upon his motion, and under these conditions any error that the court might have committed in ruling upon the motion has been waived. "If the motion be treated as proper in form, it was waived by the defendant's proceeding to introduce evidence on its own behalf, instead of resting upon the motion, and the action of the court in respect to the motion, cannot, therefore, be assigned for error here."

Northwestern Steamship Co. vs. Griggs, 146 Federal, 472.

"The rule is well settled that a motion for a nonsuit, upon which the party making it does not choose to stand, is waived by the subsequent introduction of evidence on his own behalf."

Levy vs. Larson, 167 Federal, 110.

Appellant's assignments of error nine and ten raise the question of the sufficiency of the evidence only. It is not claimed that the conclusions of law made by the court were erroneous, if the court's Findings of Fact be accepted as correct.

It will not be contended even by appellant that the appellees introduced no evidence that would tend to support the findings of the lower court. There being some evidence to support the findings of the trial court, those findings will not be disturbed on appeal.

"The case having been tried without the intervention of a jury, the court's findings are conclusive of the question of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made." (Citing authorities.)

Cook vs. Robinson, 194 Fed. 753, at page 759.

"When the chancellor has considered conflicting evidence, and made his findings and decree thereon, they must be taken to be presumptively right; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand." (Citing authorities.)

De Laval Separator Co. vs. Iowa Dairy Separator Co., 194 Fed. 425.

The authorities to this point are so numerous that we could go on quoting and citing almost indefinitely, but we consider that the question is so well settled that it will not be necessary for us to cite additional authorities.

The Findings of Fact made by the trial court are as binding and conclusive upon this court as the verdict of a jury would be, had the issues of fact been tried to a jury. The Alaska code, with reference to actions of "an equitable nature" among other things provided: "In all such actions the court, in rendering its decisions therein, shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk, and shall be incorporated in, and constitute a part of, the judgment roll of the case; and such findings of fact shall have the same force and effect, and be equally conclusive, as the verdict of a jury in an action. Exceptions may be taken during the trial to the ruling of the court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days from the entering of the decree, or

such further time as the court may allow." (Sec. 1204, *Compiled Laws of the Territory of Alaska,* 1913; *Carter's Code*, 372.)

The court made its findings of fact and conclusions of law as required by the statute, but the appellant took no exceptions to the findings made by the court, and has not prepared a bill of exceptions of any kind (at least, there is none contained in the printed record furnished to appellees.)

There having been no exceptions taken to the court's findings of fact and the lower court not having been offered an opportunity by motion for a new trial, or otherwise, to consider the errors, if any, in its findings of fact and conclusions of law, by having the same called to its attention by proper exceptions, this court will not review the evidence or the findings of the trial court and will simply consider the one question as to whether or not the decree of the court is supported by its findings and conclusions.

"The absence of a proper bill of exceptions leaves the case open for consideration upon the pleadings, findings of fact, conclusions of law, and decree, under which the substantial merits of the case will be determined."

Dalton vs. Hazelet, 182 Fed. 561.

Vera Cruz & P. R. Co. vs. Waddell, et al., 155 Fed. 401.

The rule, we believe, is without exception that the appellate court will not review the evidence or disturb the findings of fact of the trial court in the absence of proper exceptions to the findings, and the evidence contained in the transcript of the record should be stricken out by the court and the judgment affirmed; for the appellant does not contend that the decree of the lower court is not supported by the findings as made by the court.

In any event, the findings of fact made by the court below are amply and fully sustained by the overwhelming weight of the evidence.

As at the trial in the lower court, appellant will no doubt urge that the letter written by appellees Treat and Smith to him on June 5th, 1909, is conclusive of this case (defendant's Exhibit No. 9, Transcript 237).

This letter was written during negotiations between these parties and was a proposition made by appellees to appellant to "accept fifteen per cent net of royalty on lease of property provided the contract of lease is satisfactory or we will accept $12,500 in cash net for our interest in said property." In the absence of any other evidence, such

a construction as appellant now places upon this letter might be possible, though we submit that even then such a construction would be strained.

The most that can be said is that the language of this letter is somewhat ambiguous and in the light of the other evidence in this case, no such construction can be placed upon the letter.

To begin with, it is unreasonable to suppose that men such as appellees Treat and Smith, familiar with the uncertainties of mining ventures, would be willing to waive substantial rights in consideration of a mere gambler's chance that any royalties would ever be paid under the lease. Moreover, the lease which was executed after the delivery of the letter, describes appellees Treat and Smith, as the owners of an undivided one-tenth interest each in said mining claims (plaintiff's Exhibit C, Transcript 20).

Appellant seeks to overcome the weight of the evidence against him due to his signature to this lease, by posing as a man little versed in business methods, and by explaining that it was represented to him by appellee Smith that the interests of all parties concerned could best be served by describing appellees Treat and Smith as part owners. This explanation is not plausible, and a casual examination of the evidence in this case clearly demon-

strates that appellant is not as unsophisticated as he claimed at the trial to be, especially in view of the fact that he took the letter above referred to to attorneys for a construction to the effect that the appellees were limited merely to an interest in the royalties. Moreover, he himself testifies (Transcript, page 290) that had the lease failed to produce any royalties he intended to pay back to appellees their money, with interest.

During the life of the lease numerous protests were directed to the Cliff Gold Mining Co. concerning their methods of mining the ore, making certain charges against the owners of the property and against a contemplated sale of machinery which had been placed upon the property by the lessee. These protests were signed by appellant and appellees Treat and Smith as owners of the property. All statements made to appellant and appellees by the Cliff Gold Mining Co. described them as owners of the property, and the expenses of a permanent survey for patent purposes were charged to the expense of appellant and appellees according to their respective interests in the *property,* and not according to their interests in the *royalties.* (Plaintiff's Exhibit E, Transcript, page 123; Plaintiff's Exhibit F, Transcript, page 125; Plaintiff's Exhibit G, Transcript, page 132; Plaintiff's Exhibit K,

Transcript, page 192; Defendants' Exhibit 8, Transcript, page 151).

The court's attention is respectfully directed to the fact that the protest against the sale of the machinery was made by appellees Treat and Smith. Had they been interested only in the royalties as now contended by the appellee, it would have been strongly to their interest to have had this machinery sold, in which event they would have received their pro rata portion of the proceeds of the sale. The evidence shows and the witness Millard and others testified that appellant directed the Cliff Company to charge against appellees Treat and Smith their proportionate amount of all accounts chargeable to the owners of the property (Transcript, page 204).

The only protest ever directed to the Cliff Mining Co. on behalf of appellant against the recognition by said company of appellees as part owners of said property, was a letter of July 22, 1914, written by W. M. Ellis, brother and agent of appellant, at the direction of Mr. Ganty, attorney for appellant. (Defendants' Exhibit 11, Transcript, page 317.)

According to Mr. Ganty's testimony, this letter was not written at the request of appellant. That

appellant at that time recognized appellees as part owners of said mining properties, is clearly shown by the letter of appellee Treat to appellant, dated Dec. 4, 1914, and the answer to this letter by appellant. (Plaintiff's Exhibit J, Transcript, page 180; Plaintiff's Exhibit J, Transcript, page 182.)

The language of appellee Treat's letter was not written by a man who, as appellant contends, had lost all interest in these mining properties by the cancellation of the Millard lease in July, 1914. In fact, it clearly shows that appellee Treat then did and always had considered himself part owner of said property. Had appellant on the other hand, as he now claims, never known that appellee Treat claimed to be a part owner of said property until shortly before the commencement of this action in the court below, he would, as the trial court so clearly points out, have made some objection in his letter to appellee Treat's clear intimation that he was vitally interested in the further leasing and working of the property.

We deem that any further discussion of the evidence in this case is unnecessary, particularly in view of the learned trial court's clear and convincing opinion rendered at the conclusion of the trial in this case. (Transcript, pages 62-73.)

We submit that appellant assignments of error are wholly without merit and that the decree of the learned trial court should be affirmed.

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